



## **U.S. MERIT SYSTEMS PROTECTION BOARD**

### **Case Report for February 11, 2022**

**Note:** These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and they are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Case Name:** Ash v. Office of Personnel Management  
**Tribunal:** United States Court of Appeals for the Federal Circuit  
**Case Number:** [2021-2194](#)  
**MSPB Docket Number:** DA-844E-20-0536-I-1  
**Issuance Date:** February 9, 2022

##### **COURT REVIEW**

- MISCELLANEOUS

##### **DISCRIMINATION**

- MIXED CASE PROCEDURES

##### **RETIREMENT**

- PROCEDURES/MISCELLANEOUS

The petitioner filed a Board appeal challenging a reconsideration decision by the Office of Personnel Management (OPM) denying his application for disability retirement benefits. In his Board appeal, he alleged disparate treatment based on race and prior protected activity. The Board affirmed OPM's reconsideration decision and found that the petitioner failed to prove his disparate treatment claims. The petitioner then appealed the Board's decision

to the U.S. Court of Appeals for the Federal Circuit. The court issued an order to the parties to show cause whether the case should be transferred to a United States district court as a mixed case under 5 U.S.C. § 7703(b)(1)(A).

**HELD: An appeal arising from an OPM decision regarding retirement benefits can be a “personnel action” giving rise to a mixed case over which the Federal Circuit lacks jurisdiction.**

The Federal Circuit generally has jurisdiction to review final decisions of the Board. However, if the appellant (1) has been affected by an action that may be appealed to the Board and (2) alleges that a basis for the action was discrimination prohibited by certain Federal statutes, then the appeal is a mixed case and the United States district courts have jurisdiction to hear the case. 42 U.S.C. § 2000e-16 prohibits race discrimination in “personnel actions.”

The court determined that the OPM decision in this case constitutes a personnel action and that the petitioner had therefore brought a mixed case appeal over which the Federal Circuit lacks jurisdiction. Accordingly, the court transferred the case to the United States District Court for the District of Maryland.

**NONPRECEDENTIAL:**

*Ross v. Merit Systems Protection Board*, [No. 2021-2262](#) (Fed. Cir. Feb. 10, 2022) (MSPB Docket No. NY-0752-21-0008-I-1): The court affirmed the Board’s decision dismissing the petitioner’s termination appeal for lack of jurisdiction. The agency terminated the petitioner for breaching a Last Chance Agreement (LCA) that included a waiver of Board appeal rights. The court agreed with the Board that the petitioner failed to nonfrivolously allege that (1) he complied with the LCA, (2) the agency materially breached the LCA, or (3) he did not enter into the LCA knowingly and voluntarily.